No. 22,050

IN THE

United States Court of Appeals

For the Ninth Circuit

N. V. STOOMVAART MAATSCHAPPIJ "NEDERLAND",
Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
Appellee.

APPELLEE'S BRIEF

STANLEY J. MADDEN,
NOBLE K. GREGORY,
W. ROBERT BUXTON,
WALTER R. ALLAN,
225 Bush Street,
San Francisco, California 94104,
Attorneys for Appellee.

PILLSBURY, MADISON & SUTRO,
225 Bush Street,
San Francisco, California 94104,
Of Counsel.

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STATEMENT OF JURISDICTION

This is an appeal from an interlocutory judgment in Admiralty of the United States District Court for the Northern District of California, The Honorable Albert C. Wollenberg. The District Court held that appellant's vessel, the "Rotti," committed substantial faults which contributed to the collision with appellee's vessel, the "Tuttle" (Cl.Tr. 159-160, 180). The court decreed the damages should be apportioned equally between appellant and appellee (Cl.Tr. 183).

The District Court had jurisdiction of the instant case, an admiralty and maritime action, under section 1333 of Title 28 of the United States Code.

The District Court filed its Findings of Fact and Con clusions of Law (Cl.Tr. 176-181) and Interlocutory Decre (Cl.Tr. 182-183) on May 31, 1967.

Notice of appeal was filed on June 14, 1967 (Cl.Tr. 184) This Court has jurisdiction pursuant to Title 28 of th United States Code, sections 41, 1291, 1294 and 2107.

STATEMENT OF THE CASE

On August 29, 1965, at 6:57 P.M. (1857) Pacific Day light Time, the Dutch vessel S.S. ROTTI and the Amer can vessel S.S. TUTTLE collided in the San Francisc main ship channel (Rep.Tr. 157; App.Opn.Br., p. 2). Th collision occurred in dense fog in the southerly half of th channel (App.Opn.Br., pp. 2-3; Rep.Tr. 203-204). Ther were no personal injuries or cargo damage (Cl.Tr. 62, 69) Both vessels were damaged (Cl.Tr. 12, lines 16-18; 87) Appellee's vessel, the "Tuttle," admitted her fault (Rep Tr. 5; Cl.Tr. 88) and the trial proceeded on the questio whether appellant's vessel, the "Rotti," was also at fault

At 1833, the "Rotti" picked up her San Francisco Ba pilot, Captain Johan H. Sever, one mile southeast of th San Francisco lightship (Rep.Tr. 38-39). As soon as Cap tain Sever boarded, the "Rotti" 's master, Captain Cor nelius Hoedemaker, ordered full ahead maneuvering spee (12 knots) (Rep.Tr. 17, 38, 40-41).[1] Captain Sever imme

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[1]Unless otherwise specified, all speeds are given as speed *through the water* rather than over the ground because "[w]he two vessels are navigating with respect to one another in a current since the current affects both alike [citation] it is their spee *through the water* which is important" (Griffin, The America Law of Collision, 1949, sec. 255, p. 582; emphasis in original; se also Rep.Tr. 289-290).

ately went to the bridge and ordered, at 1836,[2] additional eed to full ahead maneuvering extra (13 knots) (Rep.Tr. , 160, 168). At this time, the "Rotti" was in clear eather with good visibility except that a dense fog lay ead enveloping most of the main ship channel (Rep.Tr. , 159-160, 204). The "Rotti" 's radar was on and her cond officer, J. H. Planken, was assigned the duty of dar observer and plotter (Rep.Tr. 59-60).

As the "Rotti" approached the fog bank and the enance to the main ship channel, an object, which later oved to be the "Tuttle," appeared on her radar (Rep. r. 75-76). When the two vessels were 3½ miles apart, e "Tuttle" was identified as an outbound vessel (Rep. r. 178-179). She bore 62 degrees true from the "Rotti" Rep.Tr. 62-63, 81).[3] The "Rotti" was on a course varyg from 70 to 72 degrees (Rep.Tr. 24). The "Rotti" reained on that course until just prior to the collision Rep.Tr. 26, 62).

The "Rotti" entered the main ship channel at 1847 ıd reduced her speed from extra full ahead (13 knots)

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[2]Unless otherwise specified, all times shown are times from the Rotti" 's deek bell book (Libelant's Exh. 2). The times shown by e "Rotti" 's engine room bell book (Libelant's Exh. 6) would robably more accurately refleet times at which engine orders were ted upon (Rep.Tr. 100, 102, 104; see *Skibs A/S Siljested v. /S Mathew Luckenbach* (S.D.N.Y. 1963) 215 F.Supp. 667, 673; firmed (2 Cir. 1963) 324 F.2d 563). However, a comparison of e two books shows the time lag to be uniform and the earlier nes of the deek book are used in order to give the "Rotti" the nefit of the doubt (see Rep.Tr. 320).

[3]Unless otherwise specified, all referenees to bearings are true ther than relative bearings. Therefore, since the "Rotti" was eading 70 to 72 degrees, bearings below 70 to 72 degrees would e on her left hand or port side and bearings above 70 to 72 egrees would lie on her right hand or starboard side.

to full ahead (12 knots) (Rep.Tr. 41, 156, 168, 175-176 The fog bank lay directly ahead, moving outward, and t "Rotti" commenced blowing her fog signals (Rep.T 41-44, 176, 182). She entered the dense fog at full ahe at about 1850.[4] Visibility was approximately 200 to 2 feet (Rep.Tr. 43). The bow of the "Rotti" could hard be seen from her bridge (Rep.Tr. 204).

Between 1847 and 1850, the "Rotti" had observed o its radar that the "Tuttle" went from a bearing of (degrees to 58 degrees, indicating that the "Tuttle" wa moving along the "Rotti" 's port side (Rep.Tr. 66, 80-8 190-192). The "Tuttle" 's bearing then began to in crease and she moved toward the "Rotti" 's bow (Re Tr. 190). Captain Sever stated he kept the "Rotti" a full ahead because he thought that the "Tuttle" woul proceed outbound on the north side of the channel (Re Tr. 192). The "Tuttle" then proceeded across midchanne until she was dead ahead of the "Rotti" (Rep.Tr. 5 74-75, 83-85). At 1852, when the "Tuttle" lay dead ahea the "Rotti" took its first action to slow down by stop ping her engines (Rep.Tr. 53, 194). Such action merel takes the power off the screw and there is no brakin power other than the friction of the water (Rep.Tr. 19 195, 277-279).

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[4]For each knot of speed, a vessel goes 100 feet in one minut *(Anglo-Saxon Petroleum Co. v. United States* (2 Cir. 1955) 22 F.2d 86, 87). According to her master, Captain Hoedemaker, th "Rotti" was going 12 (possibly 13) knots through the water (Re Tr. 41) into 3-knot tide and therefore was proceeding at a spee of at least 9 knots over the ground (Rep.Tr. 230), i.e., 900 feet o 300 yards per minute. The fog was encountered about ¾ of th way between Buoy 3 and Buoy 4 (Rep.Tr. 42). These buoys ar about 1300 yards apart (Libelant's Exh. 1). Therefore, the "Rotti would have covered ¾ of the distance, 975 yards, in just over minutes after 1847.

The "Rotti" kept her engines on stop for only one half f a minute (Rep.Tr. 156), which time hardly slowed her own (Rep.Tr. 277-279). At 1852½, when the "Tuttle" as only a few degrees relative off the "Rotti" 's bow, aptain Sever ordered half ahead (Rep.Tr. 156, 196-197). full ahead was ordered at 1853½ (Rep.Tr. 156). Although the relative bearing of the "Tuttle" never exeeded 15 degrees relative off the "Rotti" 's bow, Captain ever testified that "I figured he [the "Tuttle"] was in ie clear, that he was going south" toward the outside of ie main ship channel (Rep.Tr. 196-198). No visual sighting of the "Tuttle" had yet been made (Rep.Tr. 198).

The "Rotti" continued ahead until 1854, three minutes efore the collision (Rep.Tr. 156, 157). When the Rotti" 's radar showed that the "Tuttle" had reached a earing of about 15 degrees relative off the "Rotti" 's bow nd a distance of approximately one mile from the Rotti," the bearing began to decrease (Rep.Tr. 86, 198-00). This meant that the "Tuttle" was then heading back ward the "Rotti" (Rep.Tr. 86). Captain Sever ordered, t 1854, stop and then full astern (Rep.Tr. 200-201).

In less than one minute, at 1855, Captain Sever ordered stop again (Rep.Tr. 201). Captain Hoedemaker, the Rotti" 's master, stated that "stop" was ordered because it appeared that the "Tuttle," which was then only 0 degrees off the "Rotti" 's bow and closing (Rep.Tr. 4-65, 66-67, 85-86, 202), would proceed on a course parllel to the "Rotti" on the outside of the southern boundry of the channel (Rep.Tr. 30, 54). He acknowledged hat it was impossible to tell the heading of an object on he "Rotti" 's radar (Rep.Tr. 51) and that it was also

impossible to tell whether a change of course was a con tinuous swing as opposed to several unrelated change (Rep.Tr. 59). The "Rotti" 's pilot, Captain Sever, tes tified that when he ordered "stop": "I didn't know ex actly then what he [the "Tuttle"] was going to do whether he was going to stay there or not" (Rep.Tr. 224 lines 5-7). He decided to "wait and see what's going to happen" (Rep.Tr. 201, line 25, to 202, line 1).

When the "Rotti" went on "stop," the bearing and the distance of the "Tuttle" were steadily decreasing (Rep.Tr. 64-65, 66-67, 86-88, 202). This meant that the "Rotti" and the "Tuttle" were coming closer together (Rep.Tr. 87, 202) and that, in the words of the "Rotti" 's radar officer, a "dangerous situation" was developing (Rep.Tr. 87). For the next minute, the "Rotti" remained on stop while the bearing and distance of the "Tuttle" continued to decrease (Rep.Tr. 86-87, 202). Captain Sever testified that when the "Tuttle" reached a distance of six-tenths of a mile, the radar officer called out: "Looks like it's swinging back in" (Rep.Tr. 203, lines 1-4). The radar officer testified that, from the time the "Tuttle" had reached a bearing of 15 degrees relative off the "Rotti" 's starboard bow and a distance of 1.2 miles from the "Rotti", he called out the fact that the bearing and distance were steadily decreasing (Rep.Tr. 86-89). In any event, at 1856, Captain Sever ordered full astern (Rep.Tr. 204-205). He then heard a whistle from the "Tuttle," at almost the same time that the "Tuttle" ap peared dimly out of the fog, and he ordered extra full astern (Rep.Tr. 205, 207, 214). When the "Tuttle" ap peared visually, Captain Sever observed that she was

inging to her starboard and away from the "Rotti" ep.Tr. 207-209). At 1857 the "Rotti" collided with the uttle," penetrating the forward port side of the uttle" to a considerable distance (Rep.Tr. 157, 212; belant's Exh. 9). The vessels were at practically right gles to each other at the time of the collision (Rep.Tr. 8-209).

SUMMARY OF ARGUMENT

The District Court found that appellant's vessel, the Rotti," committed substantial faults which contributed the collision through its violation of the moderate eed requirements of Rule 16(a) of the International ules for Preventing Collisions at Sea. Alternatively, the istrict Court found that the "Rotti" violated the stand-d of care as codified in Rule 16(c) of the International ules. We submit that each of these determinations is rrect. We also submit that the District Court correctly ecreed, in accord with the long-established admiralty rule, at damages should be apportioned equally between ap-llant and appellee.

ARGUMENT

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE "ROTTI" COMMITTED SUBSTANTIAL CONTRIBUTORY FAULTS.

The District Court held (Cl.Tr. 180-181), inter alia, iat: (1) the "Rotti" 's immoderate speed in violation of ule 16(a) of the International Rules for Preventing Col-sions at Sea (App.Opn.Br., Appx. II, p. ii) was a sub-tantial fault contributing to the collision; (2) the

"Rotti" 's failure to remain stopped at 1852 was a sub stantial fault contributing to the collision; (3) th "Rotti" 's shift ("kick") of her engines to full ahea in the dense fog was a substantial fault contributing t the collision. As an additional and alternative holding the District Court found (Cl.Tr. 180) that in each o these respects the "Rotti" failed to meet the standar of care required of ships having radar as set forth in Rule 16(c) (App.Opn.Br., Appx. II, p. iii).[5]

It is elementary that:

> "In reviewing a judgment of a trial court sitting without a jury in admiralty, the Court of Appeal may not set aside the judgment below unless it i clearly erroneous. No greater scope of review is ex ercised by the appellate tribunals in admiralty case than they exercise under Rule 52(a) of the Federa Rules of Civil Procedure" *(McAllister v. United States* (1954) 348 U.S. 19, 20).

Accord: *China Union Lines, Ltd. v. States Steamship Company* (9 Cir. 1967) 378 F.2d 356, 357, certiorari denied (1967) 88 S.Ct. 336.

We submit that the District Court correctly decided the case and the judgment therefore should be affirmed.

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[5]Appellant correctly points out that Rule 16(c) was "not effec tive as a statute" (App.Opn.Br., p. 20) until 3 days after the collision. However, as appellant's counsel expressly agreed (Rep Tr. 11, lines 18-19) in opening argument, Rule 16(c) and its annex were at that time "a particularly persuasive guide to what good seamanship use of radar information is" (Rep.Tr. 8, lines 11-12) The applicability of the standard of care codified in Rule 16(c) is discussed in detail below (infra, pp. 15-20).

A. The "Rotti" violated the statutory requirement to go at a moderate speed in fog.

At the time of the collision, Rule 16(a) provided, as it now provides, that:

> "(a) Every vessel * * * shall, in fog, mist, falling snow, heavy rainstorms or any other condition similarly restricting visibility, go at a moderate speed, having careful regard to the existing circumstances and conditions" (App.Opn.Br., Appx. II, pp. ii, iii).

The definition of "moderate speed" under Rule 16(a) is well settled in the Ninth Circuit. That definition is known as the rule of *The Silver Palm:*

> "One of the very long-established principles of law in maritime navigation is that a vessel shall not proceed in a fog at a speed at which she cannot be stopped dead in the water in one-half the visibility before her" *(The Silver Palm* (9 Cir. 1937) 94 F.2d 754, 757).

The rule of *The Silver Palm* has always been strictly enforced.

Carr v. Hermosa Amusement Corporation, Limited (9 Cir. 1943) 137 F.2d 983, 985, certiorari denied (1944) 321 U.S. 764;

The Ernest H. Meyer (9 Cir. 1936) 84 F.2d 496, 497, certiorari denied (1936) 299 U.S. 600;

Orient Steam Navigation Company v. United States (S.D.Cal. 1964) 231 F.Supp. 469, 475;

Weyerhaeuser Steamship Company v. United States (N.D.Cal. 1959) 174 F.Supp. 663, 666, modified as to damages (N.D.Cal. 1959) 178 F.Supp. 496, approved (1963) 372 U.S. 597;

Evich v. The Santa Lucia (S.D.Cal. 1950) 94 I
Supp. 607, 609;
Union S.S. Co. of New Zealand, Limited v. Stanc
ard Oil Co. of California (W.D.Wash. 1945) 6
F.Supp. 538, 539;
The Kaga Maru (W.D.Wash. 1927) 18 F.2d 29
298.

Both Captain Sever and Captain Hoedemaker testifie
that visibility was extremely limited before, and at th
time of, the collision (Rep.Tr. 43, 204). Captain Seve
admitted that he could not even see the bow of th
"Rotti" very well (Rep.Tr. 204). The evidence showe
that the "Rotti" had a headway of possibly 5 knots a
the time of the collision (Rep.Tr. 272; and see discussio
infra, pp. 25-26). And, contrary to appellant's assertion
(e.g., App.Opn.Br., p. 27), even Captain Sever admitte
that the "Rotti" had some forward movement at th
time of the collision (Rep.Tr. 211-212). It is therefor
apparent that the "Rotti" was unable to stop within on
half the distance of her visibility and that she violate
the rule of *The Silver Palm.*

Appellant does not seriously contend that the "Rotti"
complied with the rule of *The Silver Palm.* Instead, ap
pellant argues that the existence of radar is a "circum
stance" which may excuse compliance and allow a shi
to proceed at a faster rate in fog (App.Opn.Br., pp. 12
14). Appellant cites no authority, and we are aware o
none, which would support this argument. Indeed, th
cases have continued to apply the long-standing require
ment that a vessel must be able to stop within one-hal
the distance of visibility even if that vessel is using rada

Orient Steam Navigation Company v. United States S.D.Cal. 1964) 231 F.Supp. 469, 475; *Weyerhaeuser Steamship Company v. United States* (N.D.Cal. 1959) 174 F.Supp. 663, 665-666, modified as to damages (N.D.Cal. 959) 178 F.Supp. 496, approved (1963) 372 U.S. 597).

The new section 1075.1 of Title 33[6] of the United States ode provides:

> "The possession of information obtained from radar does not relieve any vessel of the obligation of *conforming strictly* with sections 1061-1094 of this title *and, in particular,* the *obligations contained in sections 1076 and 1077* [Rule 16] *of this title*" (emphasis added).

nd it is noteworthy that the new annex to the rules, pon which appellant relies (App.Opn.Br., pp. 13, 20), rovides that "[a] vessel navigating with the aid of adar in restricted visibility *must,* in compliance with ule 16(a), go at a moderate speed," and that "[r]adar dications of one or more vessels in the vicinity may ean that 'moderate speed' should be *slower* than a ariner without radar might consider moderate in the rcumstances" (App.Opn.Br., Appx. II, pp. iii, iv; emhasis added).

The reasons why the use of radar does not excuse rict compliance with moderate speed requirements are pparent. The Court of Appeals for the Second Circuit as observed that:

> "* * * the mere use of radar does not justify a failure to obey the rules of navigation generally appli-

[6]The applicability of this section, as well as the remainder of the adar Amendment to the rules, which were effective 3 days after e collision, is discussed below (infra, pp. 18-19).

> cable. Radar is an additional safeguard, * * * but
> master who relies on radar alone and disregards an
> or all other precautions and requirements, statutor
> or otherwise, does so at his own risk. [citing authori
> ties] Indeed, it is surprising how many collision
> continue to occur despite the fact that both vessel
> are equipped with and are operating radar. We hav
> already had occasion to comment on the fact that b
> giving a false sense of security radar, when no
> properly used, may 'increase the chances of colli
> sion' " *(Afran Transport Co. v. The Bergechief* (
> Cir. 1960) 274 F.2d 469, 472-473).

In the instant case, although her radar revealed th close presence of another vessel, the "Rotti" proceede at full ahead through the dense fog until that other ves sel was dead ahead (Rep.Tr. 194). The "Rotti" the went on stop for only one half of a minute, after whic it proceeded ahead again on the erroneous suppositio that the "Tuttle" would go off in a southerly directio (Rep.Tr. 196, 198)—despite the fact that the relative bear ing never exceeded 15 degrees (Rep.Tr. 85-86).

The "Rotti" went on full astern for a brief momen when her radar showed that the distance and the relativ bearing of the "Tuttle" had begun to decrease (Rep.Tr 199-200). However, shortly thereafter the "Rotti" wen back to stop (Rep.Tr. 201). The "Rotti" 's master, Cap tain Hoedemaker, stated that this was done because i was assumed that the "Tuttle" would proceed on course parallel to the "Rotti" on the outside of the chan nel (Rep.Tr. 30, 54), even though, as Captain Hoedemake acknowledged, it was impossible to tell the heading of a object on the "Rotti" 's radar (Rep.Tr. 51). Th

"Rotti" 's pilot, Captain Sever, frankly admitted that he "didn't know exactly then what [the "Tuttle"] was going to do" (Rep.Tr. 224, lines 5-6). He decided to glide through the water on stop in order to "wait and see what's going to happen" (Rep.Tr. 201, line 25, to 202, line 1). The "Rotti" thus proceeded ahead despite the fact that her radar indicated that both the bearing and the distance of the "Tuttle" were steadily decreasing (Rep.Tr. 64-65, 66-67, 86-88, 202). This action was taken either because of an erroneous interpretation of the information gained from the use of radar or in spite of that information. In either case, the need for continued application of moderate speed requirements, including the rule of *The Silver Palm,* is plain.

Moreover, even if the rule of *The Silver Palm* were not applied, it is clear that the "Rotti" 's speed was immoderate. The "Rotti" proceeded at a full ahead of 12 knots into a dense fog. She had sighted the fog long before entering it and yet maintained her 12 knot speed. Numerous cases have found a violation of Rule 16(a) under similar facts and circumstances.

United States v. M/V Wuerttemberg (4 Cir. 1964) 330 F.2d 498, 503;

The Sylvan Arrow (2 Cir. 1939) 104 F.2d 102, 104, certiorari denied (1939) 308 U.S. 603;

The Edward E. Loomis (2 Cir. 1936) 86 F.2d 705, 708;

Villain & Fassio E. Compagnia v. Tank Steamer E. W. Sinclair (S.D.N.Y. 1962) 207 F.Supp. 700, 707, affirmed (2 Cir. 1963) 313 F.2d 722, certiorari denied (1963) 373 U.S. 948;

Moore-McCormack Lines v. The Esso Camden (S.D.N.Y. 1951) 99 F.Supp. 334, 339;
The Julia Luckenbach (E.D.Va. 1914) 219 Fed. 600, 604-605, affirmed (4 Cir. 1916) 239 Fed. 94.

Contrary to appellant's assertions (App.Opn.Br., pp. 12, 14), there is no conflict between the District Court's finding that the "Rotti" violated Rule 16(a) and the decision in *The Beaver* (9 Cir. 1918) 253 Fed. 312. *The Beaver* did not involve the distance in which a ship must be able to stop in the fog as did the later case of *The Silver Palm*. It is clear that the "Rotti" could not have stopped within one half the distance of its visibility (supra, p. 10). In addition, *The Beaver* held only that a failure to reduce speed in the fog was not necessarily a fault as a matter of law.[7] As the District Court clearly explained (Cl.Tr. 157-159, 178-180; Rep.Tr. 455-456), its decision in the instant case was based upon all the attendant facts and the circumstances.

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[7]In relation to *The Beaver,* Griffin comments:

"If there is substantial fog, full speed, even though the vessel is a slow one, is not the moderate speed required by law. Such cases as appear to be to the contrary hold merely that there is no fixed rule of law on the subject, and that, under the particular circumstances, the full speed of the vessel in question was not imprudent.

* * * * *

"In the *Beaver,* 253 Fed. 312 [1918], the Circuit Court of Appeals for the Ninth Circuit declined to hold, as matter of law, that a slow vessel, which ran at full speed (8¼ knots) in fog on the Pacific coast, was necessarily in fault. The court pointed out that the earlier American cases were decided before the addition to Article 16 of the words 'having careful regard to existing circumstances and conditions'; and declined to disturb a finding below that the vessel 'was proceeding at a moderate rate of speed for the conditions then prevailing.' It may be doubted whether this decision will be generally followed, in cases involving any substantial fog" (Griffin, The American Law of Collision, 1949, sec. 120, pp. 300-301).

The case of *United States v. Shaw, Savill & Albion Co.* 2 Cir. 1949) 178 F.2d 849 (App.Opn.Br., pp. 21-23, 29) s irrelevant to the "Rotti" 's violation of the moderate peed requirements of Rule 16(a). There was no fog in hat case and the issue there involved was not one of peed but rather of "close shaving" (178 F.2d 850-852).

. **The "Rotti" 's failure to remain stopped and its proceeding ahead were faults which contributed to the collision.**

The District Court determined that the "Rotti" committed faults, in addition to its immoderate speed, in ailing to remain at stop after 1852 and in proceeding head thereafter (Cl.Tr. 180). The court also found (Cl.Tr. 80) that the "Rotti" failed to meet the standard of care s set forth in Rule 16(c) (App.Opn.Br., Appx. II, p. iii) n these respects, as well as in respect to its immoderate peed. These findings are in accord with the standards stablished by the case law and as codified in Rule 16(c).

The "Rotti" committed plain faults under the established case law.

As the court below noted (Cl.Tr. 160), a ship has a uty to avoid not only collisions but also the risk thereof. 'he "Rotti" went to half ahead and then full ahead at time when there was insufficient information upon which o base any conclusions in regard to the "Tuttle" 's ourse (see discussion supra, pp. 12-13). In so doing, the 'Rotti" violated the "well settled [rule] that if a steamer e approaching another vessel * * * whose position or novements are uncertain, she is bound to stop until the ourse and intentions of the other vessel be ascertained vith certainty" *(Federal Insurance Company v. S.S. Roy-*

alton (6 Cir. 1963) 312 F.2d 671, 676). As was stated in a similar case,

> "A close passing in fog is dangerous at any time Deliberately undertaking it when there were other obvious and safe alternatives was a fault for which the Swerve should be responsible. Judge Learned Hand said, '* * * it must always be remembered that it is the risk of collision, not the collision itself, that masters must avoid.' When safe means of avoidance of risk of collision are obviously and readily at hand their neglect is inexcusable" *(United States v. Wuerttemberg* (4 Cir. 1964) 330 F.2d 498, 504).

Appellant apparently argues, in its discussion of *United States v. Shaw, Savill & Albion Co.* (2 Cir. 1949) 178 F.2d 849, that the "Rotti" cannot be deemed at fault because of the fact that the "Tuttle" changed course in front of her (see App.Opn.Br., pp. 21-23). This argument is misconceived. There was in the *Shaw* case no evidence from which the vessel charged with contributory fault (the "Waipawa") could have determined that the other vessel (the "Seger") had altered its course toward her (178 F.2d 851-852). In the instant case, the "Rotti" made erroneous assumptions, based on scanty information, as to the course of the "Tuttle." Moreover, the fact that a vessel changes course and passes in front of another ship does not excuse the faults of that other ship. In a fact situation similar to the instant case, it was observed that:

> "It is true that the Luckenbach was where she had right to be, on the south side of mid-channel, and ordinarily was not bound to anticipate that outbound ships would be there encountered. This, however, did not excuse her speed, immoderate in fog and attend-

ant circumstances. The inland rule against immoderate speed in fog was not abrogated because the Stewart violated the like rule requiring her to keep north of mid-channel. Both rules for safety of navigation had equal operation, and the violation of one is no less a fault than is the violation of the other.

"The Luckenbach was bound to anticipate that, in the circumstances and by misadventure or otherwise, outbound ships might proceed more or less south of mid-channel, and she also was bound to proceed at moderate speed, to avoid any collision so far as moderate speed might do so. Her failure was a proximate cause of the collision that followed" *(The Walter A. Luckenbach* (N.D.Cal. 1924) 4 F.2d 551, 552-553).

To the same effect:

Federal Insurance Company v. S.S. Royalton (6 Cir. 1963) 312 F.2d 671, 676;

Tank Barge Hygrade v. The Gatco New Jersey (3 Cir. 1957) 250 F.2d 485, 487;

States Steamship Co. v. Permanente Steamship Corp. (9 Cir. 1956) 231 F.2d 82, 88;

Yamashita Kisen Kabushiki Kaisha v. McCormick Inter. S.S. Co. (9 Cir. 1927) 20 F.2d 25, 27-28, certiorari denied (1927) 275 U.S. 562.

Appellant misses the point when it argues that there s no "support of any kind [for] the District Court's tated conclusions that the collision would not have hapened if the "Rotti" had left her engines on 'stop'; there s no evidence whatever of what the 'Tuttle' would have done if the 'Rotti' had remained stopped" (App.Opn.Br., . 23). As the District Court clearly explained (Cl.Tr. 159-

160, 180; Rep.Tr. 459-460), its conclusions were based upon the fact that the "Rotti" contributed to *the* collision which in fact did occur. The fact that a *different* collision *might* have occurred under other facts and circumstances is, of course, irrelevant to this case.

2. The "Rotti" failed to meet the standard of care as set forth in the Radar Amendment to Rule 16.

Rule 16(c) provides:

> "A power-driven vessel which detects the presence of another vessel forward of her beam before hearing her fog signal or sighting her visually may take early and substantial action to avoid a close-quarters situation, but, if this cannot be avoided, she shall, so far as the circumstances of the case admit, stop her engines in proper time to avoid collision and then navigate with caution until danger of collision is over" (App. Opn.Br., Appx. II, p. iii).

Although this section was not effective as a statute until three days after the collision, both parties agreed in opening argument that "these new rules [the entire Radar Amendment], although not binding as a statute—in the statutory sense on August 29th, * * * are a particularly persuasive guide to what good seamanship use of radar information is" (Rep.Tr. 8, lines 9-12; 11, lines 18-19). The District Court therefore noted that: "the parties are in agreement that [the rules codified in the Radar Amendment] reflect the standard of care required of ships having radar at that time" (Cl.Tr. 169). And it held that: "The 'Rotti' failed to meet the standard of care required of ships having radar as set forth in the Radar Amendment to Rule 16" (Cl.Tr. 180).

Appellant now advances the argument, which it adopted or the first time in its motion for new trial and reconideration (Cl.Tr. 172; Rep.Tr. 457-459), that only the new nnex to the rules, not Rule 16(c), should be deemed pplicable. Aside from the fact that the court's findings n respect to Rule 16(c) are plainly alternative, appelant's argument is without merit. Rule 16(c) is declaraory of good practice and the existing case law (supra, pp. 5-17), and it establishes no new or extraordinary rules of onduct. Rule 16 and its annex are part of the same coesive standard of care and should be applied together. 'or example, subsection (1) of the annex provides hat: "Assumptions made on scanty information may be angerous and should be avoided" (App.Opn.Br., Appx. I, p. iii). As pointed out (supra, pp. 12-13, 15), the Rotti" made erroneous assumptions—on scanty informaion—as to the course of the "Tuttle." In addition, subection (2) provides that: "A vessel navigating with the id of radar in restricted visibility must, in compliance ith Rule 16(a), go at a moderate speed" (ibid.). As disussed above (supra, pp. 9-14), the "Rotti" did not proeed at a moderate speed. Thus, the "Rotti" was plainly n violation of the standard of care set forth in not only ule 16(c), but also in the annex which appellant concedes s applicable to this case.

Appellant mistakenly attributes to the District Court n erroneous application of Rule 16(b) and of the case of *Afran Transport Company v. The Bergechief* (S.D.N.Y. 959) 170 F.Supp. 893. Contrary to appellant's assertions App.Opn.Br., pp. 9, 17), the court below based its finding hat the "Rotti" should have remained on stop at 1852

expressly on Rule 16(*c*), not on Rule 16(b) and the *Afran Transport* case. The court below stated:

> "Again, this Court refers to the requirement of Rule 16(c), *supra.* We read this amendment, particularly the requirement to take 'early and substantial' action, as placing a duty on the Rotti in the instant case to at least have *remained* at 'stop' five minutes before the collision until the risks of collision were over; in other words, the law placed a duty on the Rotti, when 'sighting' the Tuttle via radar to take meaningful action at an early time, not at the last minute. All the Rotti needed to do was to stop and wait until the Tuttle had passed her safely, instead of kicking her engines ahead five minutes before the collision. See, *Afran Transport Company v. The Bergechief,* 170 F.Supp. 893 (S.D.N.Y. 1959)" (Cl.Tr. 160; emphasis by court).

Thus, the District Court first determined that Rule 16(c) imposed a duty to remain at stop until the risks of collision were over. Such a situation is similar to Rule 16(b) under which a ship must stop upon hearing a fog signal and navigate with caution until the danger of collision is over. Therefore, the court's reference to *Afran Transport* as an *analogous* case was entirely appropriate.

II. THE SO-CALLED "MAJOR-MINOR FAULT" RULE DOES NOT APPLY AND THERE IS NO BASIS FOR PROPORTIONAL DIVISION OF DAMAGES.

A. The so-called "major-minor fault" rule does not apply.

The District Court determined that the "Rotti" committed statutory violations and, as we have shown, there is ample support for the court's findings. Under such circumstances, the well-established rule of *The Pennsylvania* applies:

> "[W]hen, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute" (*The Pennsylvania* (1873) 10 Wall. (86 U.S.) 136).

This rule has been consistently followed in the Ninth Circuit *(States Steamship Co. v. Permanente Steamship Corp.* (9 Cir. 1956) 231 F.2d 82, 85). Its effect, once a statutory fault is found, is to establish in the ship committing that fault the burden of proving that the fault not only did not but *could not* have contributed to the collision *(Lie v. San Francisco & Portland S. S. Co.* (1917) 243 U.S. 291, 299; *The Pennsylvania* (1873) 10 Wall. (86 U.S.) 125, 136; *States Steamship Co. v. Permanente Steamship Corp.* (9 Cir. 1956) 231 F.2d 82, 86-87). And it is irrelevant that the other ship involved may have committed serious, even gross, contributory

faults (*The Albert Dumois* (1900) 177 U.S. 240, 253 *Tank Barge Hygrade v. The Gatco New Jersey* (Cir. 1957) 250 F.2d 485, 487-488; *States Steamship Co. v Permanente Steamship Corp.* (9 Cir. 1956) 231 F.2d 82 88).

Not only was the "Rotti" unable to establish that he faults could not have contributed to the collision, it is manifest that the violation of Rule 16 in fact did con tribute to the collision. In speaking of a violation of Rul 16, the Supreme Court observed

> "* * * it is not possible in the administration of practical justice to avoid the conclusion that the effec of the wilful disobedience of this imperative and im portant statutory rule of law, which should have governed his conduct, continued as an effective force operating on the movement of his vessel to the instan of collision, driving her forward steadily, even though in the last moments slowly, to the fateful point of intersection of the courses of the two ships" (*Lie v San Francisco & Portland S. S. Co.* (1917) 243 U.S 291, 298).

The cases relied upon by appellant (App.Opn.Br., pp 15-16) are irrelevant. Appellant notes that in each of those cases a statutory fault was *claimed* against the ex onerated vessel (App.Opn.Br., p. 15). However, appellant ignores the fact that in both cases, the Court held that no contributory fault was *established (The Umbria* (1897) 166 U.S. 404, 421; *The Ludvig Holberg* (1895) 157 U.S. 60, 67). Appellant has cited no case, and we are aware of none, in which the so-called "major-minor fault" rule has been applied when a violation of Rule 16 has been established.

3. There is no basis for proportional division of damages.

Appellant urges that damages should be divided in some "proportional" manner (App.Opn.Br., pp. 25-26). In so doing, appellant would have this Court overturn "the historic admiralty rule of divided damages in mutual fault collisions" which "for more than 100 years, has governed * * * the correlative rights and duties of the two shipowners whose vessels have been involved in a collision in which both were at fault" *(Weyerhauser S. S. Co. v. U.S.* (1963) 372 U.S. 597, 600, 603). The Supreme Court has clearly stated the rule as it applies to this case:

> "Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each. * * * This maritime rule is of ancient origin and has been applied in many cases * * *" (*Halcyon Lines v. Haenn Ship Corp.* (1952) 342 U.S. 282, 284).

In arguing against this long-established rule, appellant erroneously relies upon two district court cases *(N. M. Paterson & Sons, Limited v. City of Chicago* (N.D.Ill. 1962) 209 F.Supp. 576; *McKeel v. Schroeder* (N.D.Cal. 1963) 215 F.Supp. 756). In citing the *Paterson* case, appellant states that it was "reversed on other grounds" by the Court of Appeals for the Seventh Circuit (App. Opn.Br., p. 26). Appellant has failed to point out, however, that the Court of Appeals expressly disapproved the lower court's "misconception that the decisions declaratory of the admiralty rule of equal division of damages in mutual fault collisions use the term 'mutual fault' in the sense of 'equal fault' and so restrict its application"

(N.M. Paterson & Sons, Limited v. City of Chicago (7 Cir. 1963) 324 F.2d 254, 257). The Court of Appeals noted (324 F.2d 257) that the Supreme Court has expressly held that damages are to be divided equally when there is mutual fault "even though one of the vessels may have been much more in fault than the other" and "even though the fault on one side may be much greater than the fault on the other" *(The "Atlas"* (1876) 93 U.S. 302, 313, 314).[8]

Appellant's reliance on *McKeel v. Schroeder* (N.D.Cal. 1963) 215 F.Supp. 756 fares no better. That decision was based (215 F.Supp. 759-760) entirely upon the erroneous and discredited rationale of the lower court in the *Paterson* case.

III. REPLY TO APPELLANT'S MISCELLANEOUS CONTENTIONS.

At various points in its brief, appellant discusses what it asserts to be "several clear errors of the District Court as to navigational facts" (App.Opn.Br., p. 26). We agree with appellant that these points are "not essential to this appeal" (ibid., p. 26) and that "[n]one [of them] * * * were of critical importance" (ibid., p. 11). Moreover, as the discussion which follows will show, these contentions are likewise without substance.

1. Appellant is highly critical of the District Court's finding that

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[8]This principle likewise has been long recognized in the Ninth Circuit:

> "The law is well settled that when both vessels are in fault the damages are to be equally divided, irrespective of the degree of fault" *(The Marian* (9 Cir. 1933) 66 F.2d 354, 357, certiorari denied (1933) 290 U.S. 687).

"the Rotti's first stop at 18:52 was ineffectual to slow her progress through the water, in light of her maneuvers to one-half and then full ahead one half minute later. The Rotti must have been going close to her original 12 knots at 18:54½, two and one-half minutes prior to the collision. Her maneuvers thereafter were not enough to stop her dead in the water at the time of impact" (Cl.Tr. 160).

There is ample evidentiary support for the District Court's determination. Although the "Rotti" 's master, Captain Hoedemaker, testified that the "Rotti" was dead in the water, the testimony of the "Rotti" 's pilot, Captain Sever, was equivocal (see Rep.Tr. 209-212). And Captain Sever admitted that the "Rotti" was, in fact, moving "a little bit toward" the "Tuttle" at the time of the collision (Rep.Tr. 211, line 13). Moreover, appellee's expert witness, Morris Guralnick, testified that, even giving the "Rotti" the benefit of the doubt (Rep.Tr. 320), he had a speed of at least 5 knots through the water (2 knots over the ground) at the time of the collision (Rep. Tr. 272).

Appellant levels various attacks upon the finding that the "Rotti" had headway at the time of the collision. It asserts first that the finding "probably was contributed to by the District Court's acceptance of the physically false argument * * * that there is no sideways component to the movement of a vessel through the water after the vessel is well into a turn" (App.Opn.Br., p. 27). However, contrary to appellant's assertion, the record shows that there is in fact *no* substantial sideways movement to the motion of a vessel which is well into its turning

circle. Admiral Knight expressly states that a vessel in a continuous turn, after having passed through 90 degrees of that turn, thereafter "turns uniformly in a path which is practically a circle" (Cl.Tr. 155(c)). This circle is described by following the pivoting point of the ship. The bow of the vessel would be on the *inside* of the turning circle and the stern would be on the *outside* (Cl.Tr. 155(c)-155(d)). As Knight observes, *"it is the stern and not the bow of the ship that moves in turning"* (Cl.Tr. 155(d); emphasis in original).

The "Rotti" hit the bow of the "Tuttle" at an almost 90-degree angle and penetrated a substantial distance therein (Rep.Tr. 157, 212; Libelant's Exh. 9). As Knight indicates, the bow of the "Tuttle" would have been moving away from the "Rotti." This was confirmed by Captain Sever who admitted that the bow of the "Tuttle" was swinging to *its* starboard and *away* from the "Rotti" (Rep.Tr. 207-209).[9] It is therefore clear that the "Rotti" must have been moving toward the "Tuttle." And, even though Captain Sever's testimony was initially to the contrary (Rep.Tr. 209), he admitted that he did not check the backwash until *after* the impact (Rep.Tr. 210) and that the "Rotti" was, in fact, moving "a little bit toward" the "Tuttle" at the time of the collision (Rep. Tr. 211-212).

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[9]Captain Sever apparently attempted to explain this discrepancy in his testimony by asserting that the ebb tide brought the "Tuttle" "down on" the "Rotti" (Rep.Tr. 208, lines 18-20; 226, line 14, to 227, line 3). He thus erred in failing to recognize that the tide affected both ships equally and was irrelevant in determining the relative motion of each ship to the other (Rep.Tr. 289-290, Griffin, The American Law of Collision, 1949, sec. 255, p. 582, quoted supra, p. 2, Ftn. 1).

2. Appellant criticizes (App.Opn.Br., p. 28) the Dis-ict Court for having "accepted" the testimony of an xpert witness "as against" the testimony of the "Rotti" itnesses. Appellant ignores the fact that, as shown in ie preceding paragraphs, the testimony of Captain Sever fact supports the court's conclusion regarding the for-ard motion of the "Rotti."[10]

3. Appellant also asserts that Mr. Guralnick's testi-ony in some way supports its contentions (see App.Opn. r., pp. 27-28). Thus, appellant argues

> "* * * [E]xpert Guralnick himself testified that a vessel such as the 'Rotti' proceeding at the 'Rotti's' 60 rpm or 12 knots could be brought to a stop in the water through working her engines full astern for 1½ or 2 minutes (R.T. 308) while the record shows (Lib. Exh. 2) that the 'Rotti' worked her engines full astern for a full two minutes during the relevant period * * *" (App.Opn.Br., pp. 27-28).

ppellant's statement is ambiguous and its argument is ncorrect. The record does *not* show that the "Rotti" orked its engines full astern for two minutes *in succes-ion* prior to the collision. The first full astern was rdered some time between 1854 and 1855. This order was evoked at 1855 when Captain Sever put the "Rotti" on stop." The next full astern was ordered at 1856 and the

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[10]In this regard, the testimony of W. D. McClean and Scott B. Wilkes (see App.Opn.Br., p. 3) is of no assistance to appellant. aptain McClean acknowledged that he was not watching his adar in the last minutes prior to the collision (Rep.Tr. 122). nd Lieutenant Wilkes testified that he could not estimate the peed of either vessel, other than that they both slowed down some, rior to the collision (Rep.Tr. 135).

collision occurred at 1857. Mr. Guralnick pointed out that:

> "It takes a fair amount of time before the propeller takes hold. So that at the time the signal [for 'full astern'] is given, the speed drops off gradually" (Rep.Tr. 305, lines 21-23).

Since the full astern order between 1854 and 1855 was promptly revoked, the "Rotti" plainly did not have time to effectively slow down. The maximum time of the second full astern was likewise one minute. Therefore, there is ample support for the finding that the "Rotti" 's maneuvers between 1852 and 1857 were not sufficient to bring the "Rotti" to a stop through the water.

Appellant's argument (App.Opn.Br., p. 28) in relation to average and terminal speeds is not clear. It is sufficient to point out that Mr. Guralnick testified that any possible difference in relation to calculations based on average or terminal speeds would be, at most, one-half of a knot (Rep.Tr. 304-305). And he reaffirmed his conclusion that the "Rotti" had substantial forward movement at the time of the impact (Rep.Tr. 308, lines 14-24; 308A, lines 11-15; 311, line 23, to 312, line 5).

4. Appellant seeks to raise an "adverse presumption" from the absence of "Tuttle" witnesses (App.Opn.Br., pp. 7, 28-29). However, since the "Tuttle" admitted fault (Rep.Tr. 5; Cl.Tr. 88), the only question at issue was the navigation of the "Rotti." As above shown, the testimony of the "Rotti" 's pilot supports the court's findings.

5. Appellant refers to certain of the court's findings as "garbled and inaccurate" (App.Opn.Br., p. 26). Thus,

appellant argues (App.Opn.Br., pp. 7-8) that the "Rotti" proceeded on full ahead only when her radar indicated that the "Tuttle" was proceeding in a southerly direction rather than, as the court found, "westerly on the south side of the channel" (Cl.Tr. 179). Appellant fails to note, however, that the "Rotti" erroneously *assumed* that the "Tuttle" was proceeding solely in a southerly direction. Captain Hoedemaker admitted that the "Rotti" 's radar would not show the heading of an object or whether a vessel was in a continuous swing as opposed to several unrelated changes of course (Rep.Tr. 51, 59).

Appellant also asserts that at 1854½ the "Tuttle" "was seen simply to have stopped her progress to the south" (App.Opn.Br., p. 8) and not to be, as the court found, "turning back into the channel" (Cl.Tr. 179). The evidence is clear, however, that at 1854½ the relative bearing of the "Tuttle" began to decrease (Rep.Tr. 86, 199-200). This meant, as the "Rotti" 's radar officer testified, that the "Tuttle" had turned back toward the "Rotti" (Rep.Tr. 86-87)—and therefore toward the channel. The "Tuttle" 's distance was approximately 1.2 miles, and its bearing was only 15 degrees relative off the bow of the "Rotti" (Rep.Tr. 86, 198-200). It was at this time (1855) that Captain Sever went from full astern to stop (Rep. Tr. 200-201). Captain Hoedemaker stated that it was assumed that the "Tuttle" would proceed on a course parallel to the "Rotti" (Rep.Tr. 30, 54), despite the fact that it is impossible to tell the heading of an object from the "Rotti" 's radar (Rep.Tr. 51) and despite the fact that the distance and bearing of the "Tuttle" continuously decreased (Rep.Tr. 64-65, 66-67, 86-88, 202). Cap-

tain Sever admitted that he "didn't know" what the "Tuttle" was going to do (Rep.Tr. 224, lines 5-7) and that he had decided to "wait and see what's going to happen" (Rep.Tr. 201, line 25, to 202, line 1). It was not until shortly before the "Tuttle" loomed out of the fog a short distance from the "Rotti" that Captain Sever ordered a full astern (Rep.Tr. 205, 207-208, 214). It was then too late to prevent the collision.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decree appealed from should be affirmed.

Respectfully submitted,
STANLEY J. MADDEN,
NOBLE K. GREGORY,
W. ROBERT BUXTON,
WALTER R. ALLAN,
Attorneys for Appellee.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NOBLE K. GREGORY,
Attorney for Appellee.